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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

GERHARD BRASCH,
3035 Gough Street, Apt. 8,
San Francisco, California 94123,
Petitioner in propria persona.

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Constitutions

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(Above Government Codes are found in Deering's California Codes Annotated, §§15,250-22,999 (1958).)

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STATE COMPENSATION INSURANCE FUND,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

Petitioner prays that a writ of certiorari issue to review the decree of the Supreme Court of the State of California entered in the above case on June 30, 1965.

OPINIONS BELOW

The Municipal Court, the Appellate Division of the Superior Court, the District Court of Appeal, and

the Supreme Court of the State of California delivered no opinions.

JURISDICTION

The order of the Supreme Court of the State of California "hearing denied", without opinion, was made and entered on June 30, 1965 and a copy thereof is appended to this petition in the Appendix at page ix. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Petitioner, 49, pleaded in propria persona in his complaint, filed in the Municipal Court in San Francisco, California on July 29, 1964 that the respondent State Compensation Insurance Fund, his employer from April, 1957 to January, 1961, had refused to promote him because of his age and that the respondent State Personnel Board had demoted him in rank on an employment list without explanation. He alleged damages. The State Compensation Insurance Fund demurred that the court had no jurisdiction over the subject of this action, alleging that petitioner had failed to exhaust his administrative remedies and that the statute of limitations had barred his cause of action. The court sustained the demurrer and, since petitioner's attorney had failed to amend the complaint, entered a judgment of dismissal with prejudice on motion of the respondent State Compensation Insurance Fund; no opinion was delivered.

In his notice of appeal and briefs with the Appellate Division of the Superior Court, petitioner, in propria persona, refuted the arguments of the respondent and pleaded that he was denied the equal protection of the laws and deprived of property, namely, the difference between his salary and the higher salaries of the positions for which he had been found qualified, without due process of law in violation of the Fourteenth and Fifth Amendments of the Constitution of the United States and California Government Codes; he pleaded furthermore that the statement by the General Manager of the State Compensation Insurance Fund to the Governor "that it is not in the Fund's best interest to offer 'him' reassignment or promotion" was supported by no grounds and hurt his good name.

The respondent State Compensation Insurance Fund pleaded in its answering brief as in its demurrer and that the judgment of dismissal with prejudice was proper. The Appellate Division of the Superior Court affirmed the judgment, deciding "that there is no error in the record prejudicial to the appellant" without opinion.

The applications of petitioner for rehearing or in the alternative for certification to the District Court of Appeal upon the cited Constitutional and further grounds were denied without opinion.

In his petition for a writ of certiorari with the District Court of Appeal petitioner pleaded on the Constitutional and other grounds stated in the court

below. "The petition for a writ of certiorari 'was' denied" without opinion.

In his petition for a hearing with the Supreme Court of the State of California petitioner pleaded that the decision of the court below denied his rights and damages under the Fourteenth and Fifth Amendments of the Constitution of the United States, federal courts, and state regulations. The respondent State Compensation Insurance Fund wrote that "defendants will not file an Answer . . . because . . . petitioner exhausted all available remedies" after decisions by the Appellate Division of the Superior Court. On June 30, 1965 the Supreme Court denied his petition for a hearing without opinion.

1. Whether the respondent State Compensation Insurance Fund by refusing to appoint petitioner because of his age in violation of State Government Codes prohibiting such age discrimination denied him the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States.

2. Whether the respondent State Compensation Insurance Fund by refusing to appoint petitioner and the State Personnel Board by demoting him in rank on an employment list without grounds deprived him of property, namely the difference between his salary as Intermediate Clerk and the higher salaries of the positions for which he had been found qualified, without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. Whether the statute of limitations of six years of the United States applies to the cause of petitioner.

4. Whether the respondent State Compensation Insurance Fund by informing the Governor "that it is not in the Fund's best interest to offer 'petitioner' reassignment or promotion" without hearing or filing of charges denied him due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States, acted maliciously, oppressively, and arbitrarily, and hurt the good name of petitioner.

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS AND CODES INVOLVED

The pertinent portions of the Fifth and Fourteenth Amendments to the Constitution of the United States; of Article I, Sections 3 and 10 and of Article V, Sections 7 and 21, and of Article XXIV, Section 1 and 6(a) of the Constitution of the State of California; California Government Code Sections 18901(b), 18932, 18951, 18952, 19050, 19058, 19680(c), 19681(c), 19700 and California Labor Code Sections 1050, 1052, and 1054 are set forth in the Appendix at pages i to vii.

STATEMENT

Petitioner, 49, is a layman who could not find an attorney willing to file a complaint in his cause even though he had paid the fees of two attorneys. He

pleaded in his complaint, filed on July 29, 1964 in the Municipal Court in San Francisco, in propria persona that during his employment with the respondent State Compensation Insurance Fund from April, 1957 to January, 1961 he had passed examinations for higher positions with his employer; that his superiors instead of promoting him coerced him to waive rights for promotion, refused to appoint him because of his age, appointed people Accounting Technician II whose names were on no civil service list for this class when his name was on two Accounting Technician II lists, and that the respondent State Personnel Board had denied his grievances in these matters; that qualification appraisal panels received instructions from his employer which caused them to disqualify petitioner, that a transcript of an interview for a higher position contained statements which he had not made, and that the State Personnel Board demoted him in rank from 2 to 4 on an Accounting Technician II list for Fresno. He alleged damages in the amount of $2,150. (Record, Municipal Court, complaint, pages 1-5.)

The respondent State Compensation Insurance Fund demurred that the complaint did not state facts sufficient to constitute a cause of action, that the court had no jurisdiction because petitioner had failed to exhaust his administrative remedies, and that his cause appeared to be barred by the statute of limitations. (Record, Municipal Court, demurrer, pages 1-3; memorandum, pages 1-7.)

An attorney accepted the case of petitioner. Demurrer was sustained in the hearing with 20 days

given to his attorney in which to amend the complaint; his attorney was given another extension of time, but he filed no amendment. Petitioner informed the court on October 26, 1964 that he had filed a complaint against his attorney for the return of his litigation papers, that his attorney no longer had power of attorney, and that he would amend his complaint as soon as he had received his papers. On November 20, 1964 petitioner discovered that a judgment of dismissal with prejudice had been entered against him on November 12, 1964 on motion of the respondent State Compensation Insurance Fund. In moving for this judgment the respondent had cited *Oppenheimer v. Deutchman,* 1955, 132 CA 2d Supp. 875, 281 P. 2d 650 and stated: "In the cited case, the action was dismissed with prejudice on ex parte motion of Defendant." (Record, Municipal Court, memorandum of points and authorities (Dismissal of Complaint), page 1, line 26 to page 2, line 3.) Since his letter of October 26, 1964 to the court had not been filed, petitioner informed the court and the parties on November 23, 1965 that his attorney no longer had power to represent him.

Petitioner filed immediately a notice of appeal on November 23, 1964, in which he specifically claimed violations of his rights under two provisions of the Fourteenth Amendment to the Constitution as follows:

> ". . . he is the only layman in the annals of jurisprudence who could not find an attorney willing to protect his rights under the laws and the Constitution of the State of California and under the Constitution of the United States in

court and who never received a fair hearing by the State of California concerning his grievances, explained in his complaint, which means that he was denied the equal protection of the laws and deprived of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. Wherefore the plaintiff prays that the Superior Court may annul the Judgment of Dismissal, transfer the complaint to the Superior Court, . . . protect the rights of the plaintiff under the laws and the Constitution of the State of California and under the Constitution of the United States, . . ." (Record, Municipal Court, notice of appeal, page 4, lines 13-31.)

Petitioner pleaded in his opening brief, filed on January 5, 1965 with the Appellate Division of the Superior Court, that the court below gave no grounds for entering a judgment of dismissal *with prejudice* even though in the cited case of *Oppenheimer v. Deutchman* the reviewing court had stated three times that the judgment of the court below should *not* be *"with prejudice"* and that the case of *Oppenheimer v. Deutchman* and his case are not comparable. (Record, Superior Court, opening brief, page 2, line 17 to page 4, line 9.)

In answering the arguments of the respondent State Compensation Insurance Fund in its demurrer for dismissing his complaint, petitioner explained that that he had filed his grievances with the respondent State Personnel Board on basis of Government Code 18952 and that he had exhausted his administrative

remedies when the State Personnel Board had informed him of its determinations. (Record, Superior Court, opening brief, page 4, line 10 to page 5, line 14.) He explained that Government Code 18714 and Rules 63, 64, 69, 202 and 203.5 of the State Personnel Board, Title 2, Division 1, set out verbatim by the respondent State Compensation Insurance Fund in the memorandum of points and authorities in its demurrer, do not apply to his cause; (Record, Superior Court, opening brief, page 6, lines 9-32) and likewise Government Code 19630 (Record, Superior Court, opening brief, page 12, lines 11-16). He explained that his case and the cases which the respondent had cited in the above memorandum in support of its assertions that the complaint does not state facts sufficient to constitute a cause of action or that his cause is barred by the statute of limitations are not comparable. (Record, Superior Court, opening brief, page 13, line 18 to page 14, line 26.)

In answering the assertion of the respondent State Compensation Insurance Fund on page 1, lines 31 and 32 of its demurrer that "the complaint in each alleged cause of action does not state facts sufficient to constitute a cause of action", petitioner claimed specifically violations of his rights under two provisions of the Fourteenth Amendment to the Constitution of the United States as follows:

> "The plaintiff claims damages in the amount of $2,150, which is the difference between the amount the plaintiff earned as Intermediate Clerk in the canceled policies' file room of the State Compen-

sation Insurance Fund and the amount he would have earned if he would have been promoted Compensation Insurance Technician, Accounting Technician II and then Compensation Insurance Assistant, and alleges that during his employment with the defendant State Compensation Insurance Fund his rights under Government Codes 18932, 19700, 18951, 19050, 19058, 18901(b), 19680(c), and 19681(c) were violated, and that he was denied the equal protection of the laws and deprived of property, $2,150, without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, as explained in the following." (Record, Superior Court, opening brief, page 7, lines 4-17.)

Petitioner pleaded that the respondent State Compensation Insurance Fund violated Government Code 19680(c) by giving instructions to qualification appraisal panels not to let petitioner pass interviews because of his age; that officials of the respondent violated Government Code 19681(c) by coercing him to waive employment rights for the position of Compensation Insurance Technician; that the respondent violated Government Codes 19050, 19058 and 18901(b) by appointing people Accounting Technician II whose names were on no civil service list for this class when the name of petitioner was on two Accounting Technician II civil service lists; that his demotion in rank from 2 to 4 without grounds on the Accounting Technician II list for Fresno by the respondent State Personnel Board appeared to be in disregard of Article XXIV, Section 1 of the Constitution of the State of

California. (Record, Superior Court, opening brief, page 7, line 18 to page 8, line 9.)

Petitioner explained his futile efforts to obtain redress of his grievances by petitioning the Governor, the Attorney General and several members of the State Legislature. (Record, Superior Court, opening brief, page 5, lines 15-28; page 8, line 10 to page 11, line 7.)

Petitioner specifically claimed violation of his rights under the Fourteenth Amendment to the Constitution of the United States as follows:

> "The Fourteenth Amendment of the Constitution of the United States provides that 'no state shall deny to any person within its jurisdiction the equal protection of the laws.' After the plaintiff had passed written examinations for the Compensation Insurance Assistant class, he was in the same class with all the persons who had passed this examination. The Superintendent, however, appointed people younger than the plaintiff who had passed the test as the plaintiff had, and he refused to appoint the plaintiff because of his 'twenty more years on 'his' back'. The plaintiff pleads that the refusal by the Superintendent to appoint him amounted to a denial of his Constitutional right to the equal protection of the laws. *Yick v. Hopkins,* 118 U. S. 356 (1885)." (Record, Superior Court, opening brief, page 11, lines 8-19.)

Petitioner claimed specifically that the respondent State Compensation Insurance Fund deprived him of property for public use, without compensation and

due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States as follows:

> "The plaintiff explained that during his employment with the State Compensation Insurance Fund as an Intermediate Clerk he had passed written examinations for the Compensation Insurance Assistant class and that he had been found qualified for other higher and better paid positions by qualification appraisal panels. But he was not appointed and had to continue working in the canceled policies' file room of the State Compensation Insurance Fund. He filed many grievances with State agencies in these matters, but no hearing was held. Therefore, he alleges that he was deprived not only of gaining experience in higher positions but also of the higher salaries of these positions when the State Compensation Insurance Fund let him stay in the file room and thus appropriated his services for public use without hearing and paying him the difference between his salary as Intermediate Clerk and the salaries of the higher positions for which he had been found qualified in the total amount of $2,150. *United States v. Lynah,* 188 U. S. 445, 464, 465 (1903.) *United States v. Palmer,* 128 U. S. 262 (affirming Ct. Cl. 1888); *United States v. Berdan Fire Arms Mfg. Co.,* 156 U. S. 552 (affirming Ct. Cl. 1895); *Schwartz v. Board of Bar Examiners,* 353 U. S. 232 (1957) and *Konigsberg v. State Bar,* 353 U. S. 252 (1957), cited in United States District Court for the District of Oregon, Civil No. 61-349, Memorandum of Decision, June 22, 1964." (Record, Superior Court, opening brief, page 11, line 20 to page 12, line 10.)

In a memorandum of points and authorities to his opening brief petitioner had quoted the principles which this Court had established in the above cited decisions; however, the Clerk of the Appellate Division of the Superior Court did not file it since his opening brief had already the maximum number of 15 pages permitted by the Appellate Division for opening briefs. He stated these quotations again in his memorandum of points and authorities to his petition for a writ of certiorari with the District Court of Appeal.

The respondent State Compensation Insurance Fund pleaded in its answering brief that the judgment of dismissal was proper, petitioner failed to amend his complaint and the complaint failed to state a cause of action, that the court had no jurisdiction over the action of petitioner since he had failed to exhaust his administrative remedies, and that the cause of petitioner was barred by statutes of limitations of Government Code 19630 and the 3-year limitation period of CCP 338. (Record, Superior Court, answering brief of respondent State Compensation Insurance Fund, page 2, line 30 to page 3, line 11; page 5, lines 29-32.)

The respondent admitted on page 6, lines 17-19 of its answering brief that "it is true that in the *Oppenheimer* case the court in that particular case stated that the complaint should not have been dismissed 'with prejudice' ".

The respondent quoted in full nearly all the rules and codes which it already had quoted in full in the

memorandum of its demurrer. (Record, Superior Court, respondent's answering brief, page 3, line 18 to page 6, line 11.)

Petitioner pleaded in his answering brief, that it was beyond his control to amend his complaint in the court below, that the judgment of dismissal was not proper, that he had exhausted his administrative remedies before he filed his complaint, and that the cases cited by the respondent in its answering brief and his case are not comparable. (Record, Superior Court, petitioner's answering brief, page 1, line 19 to page 2, line 3; page 2, lines 8-10; page 2, line 12 to page 3, line 2; page 3, line 13 to page 4, line 7; page 6, line 13 to page 7, line 4.)

In order to direct the attention of the Appellate Division to his claim that he raised federal questions timely and properly, petitioner specifically claimed that the respondent State Compensation Insurance Fund violated his rights under two provisions of the Fourteenth Amendment to the Constitution of the United States and by quoting the decision of this Court in *United States v. Lynah* also under the Fifth Amendment to the Constitution of the United States, petitioner specifically claimed that the statute of limitations of six years of the United States applies to his cause as follows:

> "The appellant alleged on page 11, line 8 to page 12, line 10 of his opening brief violations of his rights under the following provisions of the Fourteenth Amendment to the Constitution of the United States: 'Nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' Article I, Sec. 3 of the Constitution of the State of California states: 'The State of California is an inseparable part of the Union, and the Constitution of the United States is the supreme law of the land.' . . . In *United States v. Lynah,* 188 U. S. 445, . . . on page 457 the counsel for Mr. Lynah pleads the following: 'The cause of action accrued within six years. . . . *Kendall v. United States,* 107 U. S. 125; . . .' In *Kendall v. United States,* supra, it is stated that 'every claim—except those specifically enumerated—is forever barred unless asserted within six years from the time it first accrued'. 'Therefore, following the settled law of the court, we hold that there has been a taking of the lands for public uses, and that the government is under an implied contract to make just compensation therefor. The judgment is affirmed. *United States v. Lynah,* 188 U. S. 474.' Therefore, the statute of limitations of six years of the United States applies to the causes of the appellant, and his causes are not barred by the statute of limitations." (Record, Superior Court, petitioner's answering brief, page 4, line 9 to page 5, line 8.)

Petitioner specifically claimed interruption of the statute of limitations on December 2, 1961 as follows:

"On December 2, 1961 the appellant submitted a petition to the Chief Justice of the District Court of the United States in San Francisco, California with the request to have the District act upon his cause, since it involved violations of

his rights under the Fourteenth Amendment of the Constitution of the United States; he explained the grievances stated in his complaint. On December 5, 1961 Mr. Richard S. Goldsmith replied to him at the request of Judge Harris. Mr. Goldsmith returned the petition since it 'did not meet the requirements of federal civil procedure . . .', and he suggested among other things to have an attorney prepare a complaint. But the plaintiff could not find an attorney willing to prepare a complaint. The plaintiff pleads that the statute of limitations was interrupted when he petitioned the court to act upon his petition." (Record, Superior Court, petitioner's answering brief, page 5, line 30 to page 6, line 11.)

Petitioner explained on page 5, lines 15-32 of his opening brief that he had enquired of Governor Brown on December 13, 1960 who had jurisdiction over his grievance concerning discrimination because of age and that a secretary of the Governor informed him on January 17, 1961 that he had exhausted his administrative remedies and that "in your case, I understand that Mr. Earl Howard, General Manager of the State Compensation Insurance Fund, is aware of your situation and concurs in the conclusion of your supervisors in the Fund that it is not in the Fund's best interest to offer you reassignment or promotion . . .". Petitioner pleaded that "the Court, therefore, has jurisdiction in the above-entitled matter. Mr. Howard did not define the best interest or explain why it was not in the best interest of the Fund to promote the plaintiff. The plaintiff alleges that he

therefore was denied due process of law. *In re Porterfield,* 28 C 2d 91; 168 P. 2d 706."

Petitioner pleaded that this statement by Mr. Howard was supported by no reasons, was in contradiction to the good performance reports he had received and that it must be concluded on the basis of the preponderance of evidence which he submitted that the respondent State Compensation Insurance Fund gave similar information about the petitioner to his prospective employers because he was unable to secure steady work from February to June, 1962 after his graduation from college. Petitioner claimed therefore treble damages on the basis of State Labor Codes 1050, 1052, and 1054 in the amount of $5,256.89. He prayed judgment against the defendants in the amount of $100,000 for alleged punitive and general damages. . . . He prayed "for an order enjoining the respondents from giving any information of any kind about the appellant to third parties which might 'hurt his good name or his fair reputation' "; *Times Pub. Co. v. Carlisle,* 94 Fed. 762 (1899). (Record, Superior Court, petitioner's answering brief, page 7, line 6 to page 10, line 32; page 11, line 9 to page 13, line 3; page 13, lines 14-17.)

Petitioner pleaded in the hearing of his appeal on March 12, 1965 as stated in his briefs. The respondents did not dispute any facts which he had claimed and pleaded.

On April 6, 1965 the Appellate Division of the Superior Court decided without opinion "that there is no error in the record prejudical to the appellant",

ordered the judgment in the court below affirmed, and "that the respondent recover the costs of appeal".

In his petition for rehearing or in the alternative for certification to the District Court of Appeal petitioner pleaded that the decision of his appeal "Ordered judgment affirmed" without opinion failed to answer his pleadings that the court below had jurisdiction over his cause, that the court below was in error in entering a judgment of dismissal *with prejudice* on the basis of the cited decision in *Oppenheimer v. Deutchman,* and that the court below had no power to enter any judgment against petitioner. (Record, Superior Court, petition for rehearing, page 1, line 19 to page 2, line 16.)

Furthermore, petitioner specifically claimed that the decree of the appellate court without opinion denied his claims that the statute of limitations of six years of the United States applies to his cause and that the respondent State Compensation Insurance Fund violated his rights under two prohibitions of the Fourteenth Amendment to the Constitution of the United States as follows:

> ". . . he had pleaded that the statute of limitations of six years of the United States applies to his cause which had accrued within six years because the Constitution of the State of California states that the Constitution of the United States is the supreme law of the land and because he had alleged that the defendants violated his rights under two prohibitions of the Fourteenth Amendment of the Constitution of the United States in that

5. the State Compensation Insurance Fund denied him the equal protection of the laws when it refused to appoint him solely on basis of his age in violation of the cited laws and the Constitution of the State after he had completed examinations for higher civil service positions, and

6. appropriated the property of the plaintiff, namely the difference between the earnings of the plaintiff as file clerk and the amount he would have earned in higher positions for which he had been found qualified, by compelling him to continue working in the file room or resigning, for public use without hearing and payment of compensation." (Record, Superior Court, petition, page 2, line 21 to page 3, line 6.)

Petitioner specifically claimed that the decision of the appellate court without opinion impliedly denied the protection of his rights under the cited provisions of the Constitution of the United States as follows:

"10. The affirmation of the judgment of the court below by the Superior Court must be considered a violative interpretation of the cited provisions of the laws and the Constitution of the State of California and of the laws and the Constitution of the United States because it impliedly denies their applicability to the cause of the plaintiff. The Supreme Court of the United States explained in *Thornhill v. State of Alabama,* 310 U. S. 88, 60 Sup. Ct. 736;" . . . First . . . "It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations. *Schneider v. State,* 309

U. S. 147, 161, 162, 60 S. Ct. 146, 150, 151, 84 L. Ed. 155." (Record, Superior Court, petition for rehearing, page 3, line 26 to page 4, line 6.)

On May 4, 1965 the Appellate Department of the Superior Court denied the petition for rehearing and the application for certification to the District Court of Appeal without opinion.

Petitioner specifically claimed in his petition for a writ of certiorari, filed on May 28, 1965 with the District Court of Appeal, Division One, in San Francisco that the decisions of the court below without opinions denied that the respondents violated his claimed rights guaranteed by the cited provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States as follows:

1. Right of the equal protection of the laws under Amendment XIV, Section 1: Petitioner specifically claimed that it was violated when the respondent State Compensation Insurance Fund refused to appoint petitioner Compensation Insurance Assistant because of his age and appointed people younger than he who had passed the test as he had.

2. Right that no person shall be deprived of property for public use without due process of law under Amendment XIV and Amendment V: Petitioner specifically claimed that it was violated when the respondent State Compensation Insurance Fund by not promoting him to higher positions for which he had been found qualified and the respondent State Personnel Board by demoting him in rank from 2 to 4

without explanation on the Accounting Technician II list for Fresno deprived him of property, namely the difference between his salary as Intermediate Clerk and the higher salaries of these positions for public use without hearing and compensation.

3. Right of due process of law under Amendment XIV and Amendment V: Petitioner specifically claimed that it was violated in that

(a) the respondent State Personnel Board, the Governor, the Attorney General, and the members of the State Legislature whom petitioner had petitioned for redress of his grievances held no public hearing concerning his charges that the respondents had violated his rights under California Government Codes 18932, 18951, 19050, 19700, 19680(c), 19681(c), 19058, 18901(b), and Article XXIV, Section 1 of the Constitution of the State of California;

(b) in that the court below without opinion denied his undisputed claim for damages made upon the ground that the respondent State Compensation Insurance Fund in violation of California Labor Codes 1050, 1052, and 1054 prevented him from securing steady employment during the first half of 1962 by giving detrimental information about him to prospective employers;

(c) in that the court below without opinion affirmed the judgment of dismissal *with prejudice* entered by the Municipal Court upon the false citation by the respondent State Compensation Insurance Fund in the cited case of *Oppenheimer v. Deutchman* against petitioner;

(d) in that the court below without opinion denied his claim that the statute of limitations of six years of the United States applies to his cause;

(e) in that the court below without opinion denied the undisputed claim of petitioner that the statement by the General Manager of the respondent State Compensation Insurance Fund to the Governor concerning his qualifications could not be reconciled with his good performance reports. (Record, District Court of Appeal, petition for a writ of certiorari, page 15 to page 20.)

The District Court of Appeal denied the petition for a writ of certiorari without opinion on June 2, 1965. (Record, District Court of Appeal, page 38, as numbered by the court.)

Petitioner claimed specifically in his petition for a hearing, filed on June 14, 1965 with the Supreme Court of the State of California that the decisions of the courts below supported by no reasons denied his rights under the cited regulations and decisions of the Supreme Court of the United States and federal courts. (Record, Supreme Court, petition for a hearing, page 6, lines 16-19.)

He pleaded that in his petition for a writ of certiorari with the District Court of Appeal he had "pleaded that the denial of his appeal and petition by the Appellate Department of the Superior Court, supported by no reasons, imply the denial of his rights under the cited Amendments of the Constitution of the United States, the Constitution and laws of the

State of California, and the decisions of the Supreme Court of the United States and federal courts" as follows (Record, Supreme Court, petition for a hearing, page 3, line 21 to page 4, line 4):

(1) The respondent State Compensation Insurance Fund by refusing to appoint petitioner Compensation Insurance Assistant because of his age and appointing people younger than petitioner who had passed the test as he had violated his right of the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States.

(2) The respondent State Compensation Insurance Fund by not appointing petitioner to higher positions for which he had been found qualified and the respondent State Personnel Board by demoting him in rank on an employment list without grounds deprived him of property, namely, the difference between the amount of his salary as Intermediate Clerk and the higher salaries of these positions for public use without hearing and compensation in violation of the cited provisions of the Fourteenth and Fifth Amendments of the Constitution of the United States.

(3) Petitioner alleged damages upon the ground that the respondent State Compensation Insurance Fund by giving detrimental information about him to his prospective employers in violation of Labor Codes, 1050, 1052, and 1054 deprived him of securing a permanent job during the first half of 1962.

(4) The Municipal Court had no power to enter a judgment of dismissal *with prejudice* against him

since he had informed the court on October 26, 1964 that he had filed a complaint against his former attorney for the return of his litigation papers and that he would amend his complaint as soon as he had received his papers. The judgment of dismissal *with prejudice* had been entered upon the false citation by the respondent State Compensation Insurance Fund in the cited case of *Oppenheimer v. Deutchman,* and the Municipal Court had given no reasons for entering this judgment even though it was in contradiction to the decision by the Superior Court in this case.

(5) "Petitioner pleaded that the statute of limitations of six years of the United States applies to his case because he had claimed violations of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States."

(6) "Petitioner pleaded that the statement by the General Manager of the State Compensation Insurance Fund to the Governor that it was not in the best interest of the Fund to promote or reassign him could not be reconciled with the good performance reports he had received, that it was supported by no reasons, and that no hearings were held in this matter; he was therefore denied due process of law." (Record, Supreme Court, petition for hearing, page 4, line 5 to page 6, line 13.)

The respondent State Compensation Insurance Fund wrote to the Supreme Court on June 23, 1965 that "defendants will not file an Answer . . . because it is our view that petitioner exhausted all available

remedies" when the Appellate Department of the Superior Court had denied his petition for rehearing or certification to the District Court of Appeal. (Record, Supreme Court, letter by the State Compensation Insurance Fund.)

On June 30, 1965 the Supreme Court decided without opinion: "Petition for hearing Denied." (Record, Supreme Court.)

REASONS FOR GRANTING THE WRIT

The decree of the Supreme Court of California should be reviewed because it denies summarily, without opinion, rights which petitioner claimed under the Fourteenth and Fifth Amendments to the Constitution of the United States and it is thus not in accord with applicable decisions of this Court.

1. Petitioner pleaded that the respondent State Compensation Insurance Fund refused to appoint him Compensation Insurance Assistant because of his age ("twenty more years on his back", as his Superintendent told him) and appointed people younger than he who had passed the test for this position as he had; that this refusal was in violation of California Government Codes 18932 and 19700 prohibiting specifically discrimination because of age in the State civil service, and of Government Codes 18951 and 19050 providing that every State employee "shall be permitted to advance according to merit and ability" and that "the appointing power in all cases" . . . "shall fill positions by appointment" . . . "in strict accordance

with this part" . . . "and not otherwise"; and that the respondent by refusing to promote him disregarded these Codes in an arbitrary and unjust manner and therefore violated the provision of the Fourteenth Amendment to the Constitution of the United States that no State shall "deny to any person within its jurisdiction the equal protection of the laws". By denying his petition for a hearing without opinion, the Supreme Court of California denied the claim of petitioner that the respondent denied his Constitutional right of the equal protection of the laws.

The decree of the court below is not in accord with the applicable decision of this Court in *Yick Wo v. Hopkins, Sheriff,* 118 U. S. 356 (1885) involving discrimination on basis of race, in which the Court held on page 356:

> "An administration of a municipal ordinance for the carrying on of a lawful business within the corporate limits violates the provisions of the Constitution of the United States, if it makes arbitrary and unjust discriminations, founded on difference of race, between persons otherwise in similar circumstances."

And on pages 373 and 374:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibitions of the Constitution."

2. Petitioner had pleaded that the respondent State Compensation Insurance Fund refused to appoint him Compensation Insurance Assistant because of his age in violation of State Government Codes 18932, 19700, 18951 and 19050; that the respondent coerced him to waive employment rights for the position of Compensation Insurance Technician in violation of State Government Code 19681(c); that his rights under State Government Codes 19050, 19058, and 18901(b) were violated when his name was on two Accounting Technician II civil service lists and the respondent appointed people Accounting Technician II whose names were on no such lists; that his rights under Government Code 19680(c) were violated when the respondent gave secret instructions to qualification appraisal panels not to let him pass interviews because of his age; that the respondent State Personnel Board demoted him in rank from 2 to 4 without explanation on the Fresno Accounting Technician II list in violation of Article XXIV, Section 6(a) of the Constitution of the State of California; that he petitioned in vain the State Personnel Board, the Governor, the Attorney General and members of the State Legislature for redress of his grievances; and that no hearing was held. He pleaded that the respondents by not appointing him to the higher positions for which he had been found qualified deprived him of property, namely, the difference between the amount of his salary as Intermediate Clerk and the higher salaries of these positions for public use without hearing and compensation in violation of the cited provisions of the Fourteenth

and Fifth Amendments to the Constitution of the United States. By denying his petition for a hearing, without opinion, the Supreme Court of California denied the claim of petitioner that the respondents deprived him of property without due process of law in violation of the cited provisions of the Fourteenth and Fifth Amendments to the Constitution of the United States.

This decision of the Supreme Court of the State of California is not in accord with the applicable decision of this Court in *United States v. Lynah,* 188 U. S. 445, 464, 465 (1903), in which the Court held:

> "The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. . . . The government may take personal or real property whenever its necessities or the exigencies of the occasion demand . . . but the Constitution in the Fifth Amendment guarantees . . . that when this . . . right of appropriation . . . is exercised it shall be attended by compensation." (Cited in United States District Court for the District of Oregon, Civil No. 61-349, Memorandum of Decision, *Dillon v. United States* (June 22, 1964).)

3. Petitioner had pleaded that the statute of limitations of six years of the United States applies to his cause since Article I, Section 3 of the Constitution of the State of California states that ". . . the Constitution of the United States is the supreme law of the land" and since he had claimed violations of his

rights under the cited provisions of the Fourteenth and Fifth Amendments to the Constitution of the United States. In denying his petition for a hearing without opinion, the Supreme Court of the State of California denied his claim that the statute of limitation of six years of the United States applies to his cause.

This decision of the Supreme Court of the State of California is not in accord with the applicable decision of this Court in *Kendall v. United States,* 107 U. S. 123, 125, in which this Court held:

> "The express words of the statute leave no room for contention. *Every* claim—except those specifically enumerated—is forever barred unless asserted within six years from the time it first accrued."

4. Petitioner had pleaded that the statement by the General Manager of the respondent State Compensation Insurance Fund to the Governor that it was not in the best interest of the Fund to promote or reassign him could not be reconciled with the good performance reports he had received (quoted in full in appellant's answering brief, Superior Court, page 7, line 28 to page 8, line 16), that the "best interest" was not defined, that no hearings were held, that the statement hurt his good name, that due to similar statements to his prospective employers he could not find steady employment from February to June 1962 after his graduation from college, and that the respondents acted against him in a malicious, and oppressive manner because he was the first employee of the respond-

ent State Compensation Insurance Fund who had appealed his disqualifications in interviews for higher positions and who had filed grievances. By denying his petition for a hearing without opinion, the Supreme Court of the State of California denied petitioner's claim that he was denied due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The decree of the Supreme Court of California denying the petition of petitioner for a hearing without opinion is not in accord with the applicable decision of this Court in *Thornhill v. Alabama,* 310 U. S. 88, 96, in which the Court held:

> " 'Conviction upon a charge not made would be sheer denial of due process of law.' *De Jonge v. Oregon,* 299 U. S. 353, 362; *Stromberg v. California,* 283 U. S. 359, 367-368."

The Appellate Department of the Superior Court decided without opinion "that there is no error in the record prejudicial to the appellant" even though the petitioner had specifically claimed denial of his rights under the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of California denied the petition for a hearing without opinion after the respondent State Compensation Insurance Fund had written to this Court that the case of petitioner should not be kept alive after final decision by the Appellate Department of the Superior Court.

The decision of the Supreme Court of the State of California denying petitioner a hearing, without

opinion, is not in accord with the following applicable decisions of this Court:

> "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' *Davis v. Wechsler, supra,* at 24. Cf. *Matty v. Grasselli Chemical Co.,* 303 U. S. 197."
>
> *Brown v. Western R. of Alabama,* 338 U. S. 294, 298-299.

> ". . . The due process of law clause in the Fourteenth Amendment . . . does require . . . that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'."
>
> *Herbert v. Louisiana,* 272 U. S. 312, 316-317.

> "3. This Court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it;"
>
> *Fiske v. Kansas,* 274 U. S. 380.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
September 13, 1965.

GERHARD BRASCH,
Petitioner in propria persona.

(Appendix Follows)

Appendix

CONSTITUTION OF THE UNITED STATES

Amendment V. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV. Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF THE STATE OF CALIFORNIA

Article I. United States Constitution Supreme Law. Sec. 3. "The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

Right to Assemble and to Petition. Sec. 10. "The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances."

Article V. Executive Department. Responsible for Execution of Laws. Sec. 7. "He shall see that the laws are faithfully executed."

Law Enforcement Powers of Attorney General. Sec. 21. "Subject to the powers and duties of the Governor vested in him by Article V of the Constitution, the Attorney General shall be the chief law

officer of the State and it shall be his duty to see that the laws of the State of California are uniformly and adequately enforced in every county of the State. . . ."

Article XXIV. State Civil Service. Appointments and Promotions in State Civil Service. Section 1. "Permanent appointments and promotion in the state civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination."

Temporary Appointments. Sec. 6 (a). "No temporary appointment of a person to any position shall be made unless there is no employment list from which such position can be filled."

CALIFORNIA GOVERNMENT CODE

Government Code 18901 (b). "When a list of eligibles becomes exhausted for temporary or permanent employment before the legal expiration of the list, and a new list of eligibles for the same class is created by examination to supply the demands of the service, such new list shall become a part of the list of eligibles to be certified to the positions covered by the list. Those holding places on the prior list shall be given preference for appointment until such time as the prior list may automatically expire or all names are removed therefrom by action of the board. When the prior list has expired by reasons of limitation of time, or the names have been removed therefrom by

order of the board, then certification shall be made solely from the latter list."

* Government Code 18932. "The board shall not establish any minimum or maximum age limits for any civil service examination, except in the case of positions involving public health or safety or having the powers and duties of a peace officer, as defined in Section 817 of the Penal Code, and for trainee positions the board may establish minimum and maximum age limits. The board shall waive such age limits for persons competing in examinations on a promotional basis. The board may refuse to examine or after examination to declare or certify as eligible any one who is within one year of the compulsory retirement age provided by law for the class of positions to which the person seeks appointment.

Any person possessing all the minimum qualifications for any state position is eligible, regardless of his age, to take any civil service examination given for that position, except as provided in this section. (Amended by Stats. 1955, Ch. 798.)

* Exceptions to Section 18932 are 2256 of the Vehicle Code, 854 of the Fish and Game Code, and 15005 of the Government Code which read as follows:

2256. Notwithstanding Section 18932 of the Government Code, the minimum age limit for any examination for the position of State Traffic Officer of the California Highway Patrol shall be 21 years, and the maximum age limit shall be 31 years. (Amended by Stats. 1959, Ch. 3.)

854. Notwithstanding Section 18932 of the Government Code, the minimum age limit for any examination for the position of Fish and Game Warden of the California Department of Fish and Game shall be 21 years, and the maximum age limit shall be 40 years. The age limits set herein shall not affect civil service eligible lists in effect Sept. 7, 1955, nor apply to departmental employees in the first examination held subsequent to Sept. 7, 1955. (Amended by Stats. 1957, Ch. 456.)

15005. Notwithstanding Section 18932 of the Government Code, the minimum age limit for any examination for the position of special agent shall be 21 years, and the maximum age limit shall be 40 years. The age limits set forth herein shall not affect civil service eligible lists in effect at the time this section becomes effective. (Added by Stats. 1963, Ch. 2031.)"

Government Code 18951. "The board and each state agency and employee shall encourage economy and efficiency in and devotion to state service by encouraging promotional advancement of employees showing willingness and ability to perform efficiently services assigned them, and every person in state service shall be permitted to advance according to merit and ability."

Government Code 18952. "Any employee who feels aggrieved at any action taken by any superior or fellow employee in discouraging or in any manner hindering or preventing him from taking any examination or any other action which he deems beneficial to himself may appeal to the board in writing. Any

such appeal or communication in connection therewith is confidential and shall not be disclosed without the consent of the employee taking such appeal. Immediately after receiving such appeal the board shall investigate and shall take such action as it deems necessary."

Government Code 19050. "The appointing power in all cases not excepted or exempted by virtue of the provisions of Article XXIV of the Constitution shall fill positions by appointment, including cases of transfers, reinstatements, promotions and demotions, in strict accordance with this part and the rules prescribed from time to time hereunder, and not otherwise. Except as provided in this part, appointments to vacant positions shall be made from employment lists."

Government Code 19058. "When there is no empoyment list from which a position may be filled, the appointing power with the consent of the board may fill such position by temporary appointment. Such temporary appointment shall continue only until eligibles are available from an appropriate employment list and not to exceed the period prescribed by Section 6 of Article XXIV of the Constitution; provided, that within the limits of the period prescribed by the Constitution any temporary appointment to a position the duration of which is not to exceed the probationary period for the class may, in the discretion of the appointing power and with the approval of the board be continued for the life of such position. An appropriate employment list shall be

established for each class to which temporary appointment is made before the expiration of such appointment. (Amended by Stats. 1949, Ch. 221.)"

Government Code 19680. "It is unlawful for any person:

(c) Wilfully to furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person examined, certified or to be examined or certified under this part or board rule."

Government Code 19681. "It is unlawful for any person:

(c) To use any unfair means to cause or attempt to cause any eligible to waive any rights obtained under this part. (Amended by Stats. 1953, Ch. 431.)"

Government Code 19700. "The board, its executive officer, or any appointing power shall not adopt any rule, either written or unwritten, prohibiting the employment of any person in any state position who is otherwise qualified therefor, solely because of his age, except as provided in Section 18932.

This section does not authorize the employment of any person in any state position who has reached the retirement age for that position. (Amended by Stats. 1945, Ch. 62.)"

CALIFORNIA LABOR CODE

Labor Code 1050. "Any person, or agent, or officer thereof, who, after having discharged an employee from the service of such person or after having paid off an employee voluntarily leaving such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor."

Labor Code 1052. "Any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee in his employ to commit a violation of Sections 1050 and 1051, or who fails to take all reasonable steps within his power to prevent such violation is guilty of a misdemeanor."

Labor Code 1054. "In addition to and apart from the criminal penalty provided any person or agent or officer thereof, who violates any provision of Sections 1050 to 1052, inclusive, is liable to the party aggrieved, in a civil action, for treble damages. Such civil action may be brought by such aggrieved person or his assigns, or successors in interest, without first establishing any criminal liability under this article."

COURT DECISIONS

The following are citations of court decisions:

"(15) Dismissal—Order or Judgment.—Judgment dismissing action for failure of plaintiff to amend complaint within time allowed by law after demurrer thereto was sustained, while proper, should not be 'with prejudice'."

"(15) Although the court properly dismissed the action, it should not have done it *with prejudice (Mattoson v. Klamp* (1929), 100 Cal. App. 64, 65 (279 P. 669))."

"The judgment must be modified by striking therefrom the words 'with prejudice'."

Oppenheimer v. Deutchman, 132 C.A. Supp. 875, 876-877, 880, 281 P. 2d 650.

The phrase "not in the Fund's best interest" in the determination by the General Manager of the respondent State Compensation Insurance Fund, as communicated to the Governor, has no ascertainable meaning, either inherent or historical.

"(21a) We are of the opinion that on the face of the ordinance the indefinite standards which it enunciates provide a mechanism for the deprival of constitutional rights, not only on the basis of the guaranties applicable to free speech but also on the basis of those protecting the right to engage in lawful fashion in a lawful activity."

In re Porterfield, 28 C.2d 91, 111; 168 P.2d 706.

Order Due
July 2, 1965

In the Supreme Court of the State of California

In Bank

Brasch

v.

Appellate Department of the Superior Court of the City and County of San Francisco

---

ORDER DENYING HEARING

After Judgment by District Court of Appeal
1st District, Division 1, Civil No. 22864

Petition for hearing DENIED.

Traynor
Chief Justice

Filed June 30, 1965,
William I. Sullivan, Clerk,
By Bishel, S. F. Deputy.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 12th day of July, A.D. 1965

(Seal)

William I. Sullivan, Clerk,
By R. C. Matteoli, Deputy Clerk.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,
vs.
STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

BRIEF FOR RESPONDENT
STATE COMPENSATION INSURANCE FUND
IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of California

OPINIONS BELOW

The Municipal Court of the City and County of San Francisco, California (the trial court) made and entered its Judgment of Dismissal on November 12, 1964, without opinion after demurrer sustained with leave to plaintiff (petitioner herein) to amend his complaint, no amended complaint having been filed within the time allowed. The Superior Court of the State of California in and for the City and County of San Francisco, Appellate Department, on March 12, 1965, without opinion ordered Judgment Affirmed. On May 4, 1965, said Appellate Department without opinion denied Mr. Brasch's application for rehearing and also denied certification to the California District Court of Appeal. On June 2, 1965, without opinion, the California District Court of Appeal denied Mr. Brasch's petition for writ of certiorari. On June 30, 1965, the California Supreme Court denied Mr. Brasch's petition for a hearing without opinion.

JURISDICTION

The order of the California Supreme Court denying Mr. Brasch's petition for a hearing was made and entered June 30, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1257 (3).

QUESTION PRESENTED

Whether the petition for writ of certiorari presents any question compelling the exercise of jurisdiction by this Court where:

1. Not one of the questions presented in said petition was pleaded in, or raised by, petitioner's complaint filed in the trial court, which court granted a judgment of dismissal after demurrer sustained with leave to amend but petitioner failed to amend his complaint within the time allowed;

2. The record contains no showing that a federal question was presented to the trial court although petitioner did mention the Constitution of the United States in his Notice of Appeal from the Judgment of Dismissal rendered by the trial court, the Constitution being mentioned in a statement of "History of the Case" but not in the statement of "Reasons" for the appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

This case purports to involve "the pertinent portions of the Fifth and Fourteenth Amendments to the Constitution of the United States." (Petition for Writ of Certiorari, page 5.)

STATEMENT OF THE CASE

Petitioner, Gerhard Brasch, in propria persona, filed his Complaint for Damages in the Municipal Court of the City and County of San Francisco, State of California. The defendants named therein were State Compensation Insurance Fund and State Personnel Board. That complaint contains nine alleged causes of action. A copy of that complaint is printed in the Appendix at pages i to vi.

That complaint does not draw into question the validity of a treaty or statute of the United States. It does not draw into question the validity of a State statute upon the ground of its being repugnant to the Constitution, treaties or laws of the United States. It does not specially set up or claim any title, right, privilege or immunity under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

State Compensation Insurance Fund demurred to said complaint and to each alleged cause of action thereof upon six separate grounds:

1. The Court lacked jurisdiction in that plaintiff failed to allege that he had exhausted his administrative remedies.

2. Failure to state facts sufficient to constitute a cause of action.

3. Any alleged cause of action appeared to be barred by the Statute of Limitations.

4. The complaint was ambiguous.

5. The complaint was unintelligible.

6. The complaint was uncertain.

On August 14, 1964, the demurrer was sustained with twenty days leave allowed to Mr. Brasch in which to amend his complaint. Thereafter, upon the request of an attorney acting for Mr. Brasch, time was extended to plaintiff to and including September 11, 1964 within which to amend his complaint. Mr. Brasch later claimed that on October 26, 1964, he *informed* the Court that he would amend his complaint as soon as he received certain papers from said attorney and that said attorney "no longer has power of attorney to represent him."

No amendment to the complaint was ever filed. No amended complaint was ever filed. On November 12, 1964, upon *ex parte* motion of State Compensation Insurance Fund, the Court made and entered its Judgment of Dismissal dismissing the action with prejudice.

Mr. Brasch failed to move the Court to set aside said judgment. On November 23, 1964, he filed a Notice of Appeal, appealing to the Superior Court of the State of California, in and for the City and County of San Francisco, from said Judgment of Dismissal.

In said Notice of Appeal, Mr. Brasch set forth a total of seven reasons for his appeal. Not one of those seven reasons made any mention of the Constitution, treaties or laws of the United States. Not one of said seven reasons set up or claimed any title, right, privilege or immunity under the Constitution, treaties or

statutes of, or commission held or authority exercised under the United States. Under the heading, "History of the Case," Mr. Brasch did state:

> "The many futile endeavors by the plaintiff to find an attorney willing to file a complaint in the above entitled matter and the facts explained above prove, in the opinion of the plaintiff, beyond any doubt that he is the only layman in the annals of jurisprudence who could not find an attorney willing to protect his rights under the laws and the Constitution of the State of California and under the Constitution of the United States in court and who never received a fair hearing by the State of California concerning his grievances, explained in his complaint, which means that he was denied the equal protection of the laws and deprived of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States."

Mr. Brasch added a prayer in which he included a request that the court

> ". . . protect the rights of plaintiff . . . under the Constitution of the United States . . ."

In Appellant's Opening Brief which Mr. Brasch filed in the said California Superior Court he mentioned the Fifth and the Fourteenth Amendments to the Constitution of the United States. His statements in that regard were in reference to his view as to why or how he had a cause of action and suffered the damages for which he had prayed in his complaint. His references to those Amendments *failed to relate to any claim of error on the part of the trial court.*

State Compensation Insurance Fund filed its Answering Brief. No mention was made therein to the Constitution, treaties or laws of the United States.

Mr. Brasch then filed Appellant's Answering Brief in which he attempts to show, for the *first* time, that because of the Fifth and Fourteenth Amendments the "statute of limitations of six years of the United States applies to the causes of action of the appellant, and his causes of action are not barred by the statute of limitations." He also, for the first time, claimed that the statute of limitations was "interrupted" on December 2, 1961 because he had submitted a petition to the Chief Justice of the District Court of the United States in San Francisco, California, requesting that Court to act because his cause involved violations of his rights under the Fourteenth Amendment. Contrary to petitioner's Statement (Petition, page 14), we are unable to discover where or how "petitioner specifically claimed that the respondent State Compensation Insurance Fund violated his rights under two provisions of the Fourteenth Amendment. . . ."

The Appellate Department of said Superior Court denied the appeal of Mr. Brasch. Mr. Brasch still did not move the trial court to set aside the Judgment of Dismissal. Mr. Brasch then filed with said Superior Court his petition for rehearing or in the alternative for certification to the District Court of Appeal of the State of California. On May 4, 1965, the Court denied rehearing and denied certification. On May 11, 1965, the time in which Mr. Brasch could have moved

the trial court to set aside the Judgment of Dismissal expired without such motion ever being made.

Mr. Brasch petitioned for a writ of certiorari, which petition was denied by the District Court of Appeal for the State of California. He then petitioned for a hearing by the California Supreme Court, which petition was denied. His petition to this Court followed.

SPECIFICATION OF ERRORS URGED BY PETITIONER

Although it is difficult to condense them, it appears that petitioner's contentions are four in number:

1. That respondent State Compensation Insurance Fund denied him the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States by refusing to appoint or promote him because of his age.

2. That said State Fund, by such refusal, and the State Personnel Board, by demoting him in rank on an employment list, deprived him of property without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. That "the statute of limitations of six years of the United States applies to his cause."

4. That said State Fund by informing the Governor of California "that it is not in the Fund's best interest to offer petitioner reassignment or promotion" denied him due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

ARGUMENT

1. NO FEDERAL QUESTION WAS PROPERLY RAISED OR PRESERVED IN THE STATE COURTS.

None of petitioner's contentions as stated immediately above was set forth in his Complaint for Damages filed by him in the trial court. (Appendix, pages i to vi.) He never amended that complaint although given leave to do so. Even now, Mr. Brasch does not contend that any of those contentions were presented to the trial court prior to judgment therein. (Petition, pages 5-7.) Thus, those contentions were never properly presented for determination by any Court. Not having been presented properly below, they are not now properly before this Court. *Bailey v. Anderson* (1945), 326 U.S. 203, 206-207, 66 S.Ct. 66, 90 L.Ed. 3, 6.

Briefs filed in the state courts form no part of the state court record for the purpose of Supreme Court review and they cannot be relied upon to establish that a federal question was raised, even if they are incorporated into the record sent to this Court. *Live Oak Water Users' Assn. v. Railroad Commission of California* (1925), 269 U.S. 354, 357-358, 46 S.Ct. 149, 70 L.Ed. 305, 309.

When Mr. Brasch appealed from the trial court's Judgment of Dismissal, the only actual question before the Appellate Department of the California Superior Court was whether that judgment was proper. That judgment was predicated upon Mr. Brasch's failure to amend his complaint within the time allowed after the demurrer to the complaint had been

sustained. Mr. Brasch's petition does *not* show that he ever even entertained a thought of a federal question prior to the entry of that judgment adverse to him.

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2. THE PETITION FAILS TO DEMONSTRATE THAT THE DECISIONS BELOW DID NOT REST UPON A STATE GROUND WHICH INDEPENDENTLY AND ADEQUATELY SUPPORTS THE JUDGMENT.

Mr. Brasch's petition (page 6) shows that the (California) statute of limitations was but one of the grounds upon which the State Fund demurred to his complaint. Nowhere does he set out the basis upon which the demurrer was sustained. He did not do so in his appeal nor in his petitions to the California Courts. The State Fund had demurred upon six grounds. If any of the other five grounds was sufficient, Mr. Brasch's appeal was properly denied by the Appellate Department of the California Superior Court without even reaching the question of the statute of limitations. (California Code of Civil Procedure, section 475; Cal. Stats. 1897, page 44. See Appendix, page vii.)

At no time did Mr. Brasch move the trial court to set aside its Judgment of Dismissal. He had time to so move even after rehearing of his appeal was denied on May 4, 1965. California Code of Civil Procedure, section 473 (Cal. Stats, 1961, ch. 722, page 1965), reads in part:

> ". . . The court may, upon such terms as may be just, relieve a party or his legal representative

from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken; . . ."

Assuming, *arguendo,* that Mr. Brasch's appeal did turn upon the statute of limitations, his contention that "the statute of limitations of six years of the United States applies to his cause" is fallacious.

Petitioner has not pointed out any statute of the United States providing for a limitation of six years. The case cited at page 29 of his petition (*Kendall v. United States,* 107 U.S. 123, 125, 17 Otto 123, 27 L. Ed. 437) is *not* in point. That case dealt with claims against the United States, cognizable by the Court of Claims. It did not deal with a claim of any person who on appeal from a judgment of dismissal by a state trial court claimed for the first time that the Constitution of the United States gives him a six-year period of limitations within which to bring an action against an employer other than the United States for damages resulting from failure to promote that person as an employee.

California Government Code section 19630 (Cal. Stats. 1961, ch. 625, page 1783) reads:

"No action or proceeding shall be brought by any person having or claiming to have a cause of

> action or complaint or ground for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in this State or the administration thereof unless such action or proceeding is commenced and served within one year after such cause of action or complaint or ground for issuance of any writ or legal remedy first arose. Such a person shall not be compensated for the time subsequent to the date when such cause or ground arose. Where an appeal is taken from a decision of the board the cause of action does not arise until the final decision of the board."

Where it clearly appears on the face of the complaint that the cause of action is barred by the statute of limitations, the objection may be taken by demurrer. *McFarland v. Holcomb* (1898), 123 Cal. 84, 55 Pac. 761. Mr. Brasch in his complaint alleged the times of various examinations, incidents and transactions, all as occurring before July 28, 1961. His complaint was filed July 29, 1964, more than three years after the most recent conceivably-alleged cause of action arose. A memorandum of points and authorities which had been filed with, and in support of, the demurrer of the State Fund also brought to the attention of the trial court that California also has a general three-year statute of limitations in addition to Government Code section 19630, *supra*.

This Court has said that where the highest court of a state delivers no opinion in rendering a judgment, and it appears that the judgment *might* have rested upon a nonfederal ground, the Court will not take

jurisdiction to review the judgment. *Stembridge v. Georgia* (1952), 343 U.S. 541, 96 L.Ed. 1130, 72 S.Ct. 834; *Fay v. Noia* (1963), 372 U.S. 391, 428, 9 L.Ed.2d 837, 863, 83 S.Ct. 822.

In the case at bar, each and all of the judgments of the appellate courts could have rested upon one or more of the following independent and adequate state grounds:

1. Alleged causes of action barred by limitations of time.

2. No cause of action stated.

3. Remedies not exhausted prior to suit.

4. Remedies not exhausted prior to appeal.

5. Complaint ambiguous, uncertain or unintelligible.

6. No prejudicial error.

7. Failure to amend complaint before expiration of leave to amend.

3. THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The granting of certiorari is discretionary and even if jurisdiction on the petition for the writ were present, such presence does not determine the exercise of such jurisdiction. *Hammerstein v. Superior Court of California* (1951), 341 U.S. 491, 492, 71 S.Ct. 820, 75 L.Ed. 1135, 1137; rehearing denied 342 U.S. 843, 72 S.Ct. 21, 96 L.Ed. 637.

Certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from the parties. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897, 904.

Mr. Brasch's petition fails to contain any special and important reason for the granting thereof. (Rules of the Supreme Court, Rule 19, 28 U.S.C.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 11, 1965.

Respectfully submitted,
T. GROEZINGER,
LOTON WELLS,
Counsel for Respondent
State Compensation Insurance Fund.

J. J. VONK,
DAVID GREEN,
Of Counsel.

(Appendix Follows)

Appendix

Gerhard Brasch, in propria persona
3035 Gough Street, Apt. 8
San Francisco, California 94123
Telephone: 673-2085

In the Municipal Court of the City and County of San Francisco
State of California

No. 519083

GERHARD BRASCH,
Plaintiff,
vs.
STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Defendants.

COMPLAINT FOR DAMAGES

Plaintiff complains and alleges:

I.

For a first cause of action that he, 48, during his employment as Intermediate Clerk with the State Compensation Insurance Fund in San Francisco, California, from April, 1957 to January, 1961, passed a written examination and an interview before a qualification appraisal panel for the class Compensation Insurance Technician and that his rank on the open list dated January 15, 1958 was 005; that the Per-

sonnel Officer of the State Compensation Insurance Fund a few days after the establishment of this list informed the plaintiff that he had to fill several openings in the claims department from this list and that he asked the plaintiff to waive his right for employment in the claims department since the public would not understand him on the phone because the plaintiff has an accent; that the plaintiff refused to waive; that the Personnel Officer understood the plaintiff without any difficulty; that the Personnel Officer explained to the plaintiff among other things that "I have the power to exhaust the whole list completely, to go down the list all the way without considering you for any other position unless you waive"; that the plaintiff finally waived because the Personnel Officer and the Assistant Personnel Officer promised to give him the first opening in the payroll department for which work they considered him qualified if he would waive his right for employment in the claims department; that in the fall of 1958 the Personnel Officer and the Superintendent of the payroll department interviewed the plaintiff for an opening in the payroll department; that the plaintiff was not offered a position and that the list expired.

II.

And for a second cause of action that he filed a grievance concerning his waiver alleged in I, supra, with Mr. John F. Fisher, Executive Officer of the State Personnel Board, Sacramento, California by certified mail with return receipt on May 27, 1959; that he enquired on January 2, 1960 of Mr. Fisher

what decision Mr. Fisher had made; that Mr. Fisher informed the plaintiff that they had no record of his letter, and that the plaintiff sent Mr. Fisher a copy; that thereupon Mr. Fisher advised the plaintiff that the statute of limitations barred acting upon his grievance and that there was no evidence of the waiver of the plaintiff or of any illegal appointments in the records.

III.

And for a third cause of action that a few weeks after he had passed a written examination for the Compensation Insurance Assistant class in March of 1959 the Superintendent of Underwriting at that time explained to the plaintiff at the end of an interview for this position, "I understand you. If I give you a job in my department, you would be promoted and you would have to talk to the public. The public will not understand you because you have an accent. I cannot give you a job in my department;" that he would make an effort with the Personnel Officer to get the plaintiff a job in the accounting or in the payroll department; that the plaintiff was disqualified in the interview for this class by a qualification appraisal panel.

IV.

And for a fourth cause of action that on December 30, 1959 he took a test for the Compensation Insurance Assistant class and that the successor of the Superintendent of Underwriting in III, supra, informed the plaintiff on the next day that he had passed the test; that he refused to appoint the plain-

tiff, explaining to him that "You have twenty more years on your back. We have to get the best of the applicants, and you do not compare favorably with them. You have to go back to your file room;" that he also explained to the plaintiff that the qualification appraisal panel has instructions as to the type of people the Fund wants and that the panel in their disqualifying reasons could not state that the plaintiff is too old; that the Superintendent mentioned furthermore, "You have been so long in the file room; apparently you are not getting any place. You are running against a wall;" that the Superintendent suggested very definitely to the plaintiff to look for work somewhere else; that he was disqualified in the interview for the Compensation Insurance Assistant class by a qualification appraisal panel.

V.

And for a fifth cause of action that he filed a grievance concerning discrimination on basis of age in the State civil service with Mr. John F. Fisher, Executive Officer of the State Personnel Board in Sacramento, California, explaining that "I feel aggrieved because instead of encouraging me in my efforts to advance in the State civil service one suggested to me that I look for work somewhere else although I have been doing a good job in my basement file room for about two years and eight months, passed an interview for Compensation Insurance Technician, and the State Personnel Board granted my appeal from the disqualification in the interview for the Accounting Technician II class with the Fund"; that Mr. Fisher

rejected the grievance of plaintiff two weeks later, writing that ". . . it does not appear that your grievance is in an area over which the State Personnel Board has jurisdiction. . . . we found no evidence in your letter of a violation of civil service procedures." That plaintiff enquired on January 30, 1960 and on February 27, 1960 of Mr. Fisher about the authority having jurisdiction over his grievance; that he received no reply.

VI.

And for a sixth cause of action that he wrote on January 24, 1961 to Mr. John F. Fisher, Executive Officer of the State Personnel Board, Sacramento, California that "my rank on the Accounting Technician II promotional employment list of the State Compensation Insurance Fund dated June 6, 1960 was 2 and is now 1. As to my knowledge positions for Accounting Technician II and Accounting Technician III were filled by people not on this list. I would appreciate it very much if you would kindly let me know why I was bypassed although my rank on the list was 2 and later 1." That the plaintiff was informed on February 2, 1961 that two appointments had been made from an *older* Accounting Technician II list for the State Compensation Insurance Fund dated December 1, 1958 on which the eligibility of the plaintiff had been established on February 19, 1959.

VII.

And for a seventh cause of action that he furthermore was informed in the letter dated February 2,

1961, mentioned in VI, supra, that "Your name will be retained on the Accounting Technician II spot list for Fresno. Your standing on this list is currently number four." That the rank of plaintiff on the Accounting Technician II list for Fresno dated November 12, 1959 was 2.

VIII.

And for an eighth cause of action that he informed the members of the State Personnel Board during the hearing of his appeal from his disqualification in the interview for the Compensation Insurance Assistant class on October 8, 1959 that the transcript of this interview contained several statements which he had not made; that a member of the Board made a statement such as, "How could that happen?"

IX.

And for a ninth cause of action that the defendants did the acts herein alleged maliciously and oppressively. Plaintiff therefore is entitled to exemplary and punitive damages in an additional sum as the Honorable Court may determine.

Wherefore, plaintiff prays judgment against the defendants for loss of earnings for the sum of $2,150.00 plus interest at the rate of 5% since January 1, 1961 together with costs of suit incurred herein, and for such other relief as may be proper.

Gerhard Brasch

Municipal Court Filed—Summons Issued Jul 29 1964
James M. Cannon, Clerk
By J. Kostolefsky, Deputy

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 475. **No error or defect to be regarded unless it affects substantial rights.** The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown. [Enacted 1872; Am. Stats. 1897, p. 44.]

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH, *Petitioner,*

vs.

STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

On Writ of Certiorari to the Supreme Court
of the State of California

REPLY BRIEF FOR PETITIONER

GERHARD BRASCH,
3035 Gough Street, Apt. 8,
San Francisco, California 94123,
Petitioner in propria persona.

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In the Supreme Court
OF THE
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OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

REPLY BRIEF FOR PETITIONER

I.

PETITIONER DID NOT ACT IN PROPRIA PERSONA IN THE MUNICIPAL COURT AFTER FILING HIS COMPLAINT; HE WAS REPRESENTED BY ATTORNEYS.

The respondent State Compensation Insurance Fund asserts throughout its brief in opposition that petitioner, having filed his complaint in the Municipal

Court in propria persona, continued to act in propria persona before the court, even though petitioner had explained in his petition (last paragraph, pages 6-7) that an attorney represented him in court after he had filed his complaint.

This matter requires clarification. Petitioner explained on page 5 of his petition that "he could not find an attorney willing to file a complaint in his cause even though he had paid the fees of two attorneys". Of the many attorneys in San Francisco whom he asked to file a complaint in his matter, two attorneys successively in 1961 agreed to file a complaint. He gave them his papers and paid their fees. The first attorney wrote to the petitioner about two months after he had written to the respondent State Compensation Insurance Fund that he had no substantial cause of action for money damages. The second attorney informed the petitioner about three weeks after he had written to the respondent State Personnel Board that any redress now seems unavailable and that nothing further could be done in his matter. Petitioner could find no other attorney willing to file a complaint.

After petitioner had filed his complaint, the respondent State Compensation Insurance Fund demurred. Messrs. Vincent Hallinan, Carl B. Shapiro, and Patrick Sarsfield Hallinan, Attorneys at Law, 345 Franklin Street, San Francisco, California 94102 agreed to represent petitioner in his complaint against the respondents State Compensation Insurance Fund and State Personnel Board. Petitioner gave his litiga-

tion papers to Mr. Brian D. Rohan, an attorney in the offices of Messrs. Hallinan, Shapiro and Hallinan. In the hearing of the demurrer on August 14, 1964 Mr. Brian D. Rohan appeared for petitioner and upon his request was granted an extension of twenty days for amending the complaint after the court had sustained the demurrer. On August 17, 1964 petitioner paid the requested fee of $50 to Messrs. Hallinan, Shapiro and Hallinan for filing the amendment. On September 3, 1964 Mr. Rohan requested and was granted a second extension of time "to and including September 11, 1964" for amending the complaint. But Mr. Rohan filed no amendment even though petitioner told Mr. Rohan many times of his concern that the respondents after September 11, 1964 could move the court any day to dismiss his complaint. Mr. Rohan had always excuses for not filing the amendment and promised to file it. He told petitioner, "Don't worry. When the court dismisses your complaint, we file another one. I pay the filing fee." He explained to petitioner that his cause is called "inverse condemnation", that the respondents violated his rights under the Fourteenth Amendment to the Constitution of the United States, and that the statute of limitations of the United States applies to his cause. Since Mr. Rohan did not amend the complaint and did not return the litigation papers and the fee to him, petitioner filed a complaint against Mr. Rohan on October 26, 1964 in the Municipal Court in San Francisco for the return of his litigation papers and his fee. On the same day petitioner gave a letter, addressed to the

Honorable Leland J. Lazarus, Presiding Judge of the Municipal Court, to an employee in the office of the court in which he informed the court of his complaint against Mr. Rohan and of his intention to amend his complaint, acting again in propria persona, as soon as he had received his litigation papers, which was a request for an extension of time. (Appendix page i.)

A Judgment of Default by Court was entered against Mr. Rohan on November 12, 1964 (No. 524400, Bk. Vol. 614 D, page 29360). Petitioner sent Mr. Rohan a copy of this judgment, but Mr. Rohan did not reply. Petitioner was informed in the office of the court on November 20, 1964 that a writ of execution against Mr. Rohan could not be entered since he had not listed the litigation papers in the judgment against Mr. Rohan which he had drawn up. An employee in the office of the court wished to ascertain which litigation papers Mr. Rohan had been ordered to return and inspected the file in the action of petitioner against the respondents, whereupon petitioner was utterly perplexed when he noticed that the file contained a Judgment of Dismissal with Prejudice entered against him on November 12, 1964 upon ex parte motion of the respondent State Compensation Insurance Fund. The respondent State Compensation Insurance Fund had sent three copies of this judgment to his former attorneys, but petitioner received no copy from them.

Employees in the office of the court told petitioner that the court could do nothing concerning the two judgments. Therefore, he appealed from the Judgment of Dismissal with Prejudice against him on

November 23, 1964 and from the Judgment of Default by Court on the following day to the Appellate Department of the Superior Court in San Francisco, California.

On November 28, 1964 petitioner received by mail from his former attorneys his litigation papers and other papers, among them correspondence and a stipulation between Messrs. Hallinan, Shapiro and Hallinan and the Attorney General of which his former attorneys had not informed him before, namely:

Letters by the Attorney General to Messrs. Hallinan, Shapiro, and Hallinan dated August 18 and September 29, 1964. (Appendix, pages ii, iv.)

Stipulation Extending Time to Plead between Messrs. Hallinan, Shapiro, and Hallinan and the Attorney General of California. (Appendix, page v.)

II.

PETITIONER FOR REASONS BEYOND HIS CONTROL COULD AND DID NOT ACT IN PROPRIA PERSONA BEFORE THE MUNICIPAL COURT IN OPPOSITION TO THE ASSERTIONS OF THE RESPONDENT STATE COMPENSATION INSURANCE FUND.

The respondent State Compensation Insurance Fund states many times throughout its brief in opposition that petitioner was granted leave to amend his complaint, that petitioner failed to file an amended complaint, and on page 5 of its brief that "thereafter, upon the request of an attorney acting for Mr. Brasch, time was extended to plaintiff to and including Sep-

tember 11, 1964 within which to amend his complaint." The respondent State Compensation Insurance Fund, however, had knowledge at all times that petitioner was represented by attorneys after he had filed his complaint because according to the CERTIFICATE OF SERVICE BY MAIL OF JUDGMENT OF DISMISSAL it sent a copy of this judgment to Gerhard Brasch, c/o Brian Rohan, Esq. (petitioner did not receive this copy), another one to Hallinan, Shapiro and Hallinan, and a third copy to Brian Rohan, Esq. (Record, Municipal Court.)

III.

PETITIONER'S ATTORNEYS DID NOT PROTECT THE RIGHTS OF PETITIONER.

While petitioner's attorneys represented him, they never informed him of their correspondence with the Attorney General of California, counsel for the respondent State Personnel Board and the stipulation, cited in I, supra, in which they granted the State Personnel Board time "up to and including the thirtieth day following the filing by plaintiff of his amended complaint in the above matter, in which to demur, answer or otherwise plead". Since petitioner's attorneys did not enter into any stipulations with the counsels for the respondents to protect the rights of their client and did not amend his complaint, the respondent State Compensation Insurance Fund could move ex parte for a judgment of dismissal with prejudice any time after September 11, 1964.

IV.

IT WAS NOT NECESSARY FOR PETITIONER TO MOVE THE MUNICIPAL COURT TO SET ASIDE THE JUDGMENT OF DISMISSAL WITH PREJUDICE.

The respondent State Compensation Insurance Fund argues for the *first* time several times in its brief in opposition that petitioner failed to move the Municipal Court to set aside the Judgment of Dismissal with Prejudice. In his notice of appeal petitioner prayed that "the Superior Court may annul the Judgment of Dismissal, transfer the complaint to the Superior Court . . ." By these words petitioner prayed that the Superior Court may set his cause for trial in the Superior Court since California Code of Civil Procedure § 988h (Appendix, page vi) authorizes the Superior Court to reverse any judgment of a municipal court and order a new trial. Petitioner pointed out on page 8 of his petition that he had pleaded the error of the Municipal Court in entering a Judgment of Dismissal with Prejudice in his opening brief. It was, therefore, not necessary for petitioner to move the Municipal Court to set aside the Judgment of Dismissal with Prejudice.

V.

CONCERNING THE ARGUMENT OF THE RESPONDENT STATE COMPENSATION INSURANCE FUND THAT "NO FEDERAL QUESTION WAS PROPERLY RAISED OR PRESERVED IN THE STATE COURTS".

In support of the above argument, the respondent cites *Bailey v. Anderson* (1945), 326 U.S. 203, 206-

207, which deals with a condemnation proceeding, in which the appellant "was given full opportunity to be heard and to introduce evidence before the Commissioners" (page 205) and "appellant, for the first time, assailed on constitutional grounds the asserted denial of interest by his assignments of error in the State Supreme Court of Appeals" (page 206). This case and the case of petitioner are not comparable since this case deals with a condemnation award, the appellant had a hearing, in which he could introduce evidence and the question from what date interest should be allowed on the condemnation award was first submitted upon Constitutional grounds in the highest court of the State, whereas petitioner claimed at the first opportunity in the courts below that the respondents denied him the equal protection of the laws and deprived him of property for public use without compensation and due process of law in violation of the cited provisions of the Fourteenth Amendment to the Constitution of the United States and that he never had an opportunity to amend his complaint in the trial court and to introduce evidence.

The next cited case in this context, *Live Oak Water User's Assn. v. Railroad Commission of California* (1925), 269 U.S. 354, 357-358, deals with a rate fixing order made by a commission and in which the writ of error was dismissed since "the constitutionality of the order itself was not definitely drawn in question before the state court prior to a petition for rehearing which was denied without more" (pages 354-355). Evidently this case and the case of petitioner are not

comparable for the reasons stated in the preceding paragraph.

The respondent discusses next "the trial court's Judgment of Dismissal". The court did not enter a judgment of dismissal; the court entered a Judgment of Dismissal *with Prejudice* based upon the false citation in the Oppenheimer case (*Oppenheimer v. Deutchman,* 132 CA 2d Supp. 875, 876-877) by the respondent State Compensation Insurance Fund in its Memorandum of Points and Authorities (Dismissal of Complaint).

The respondent then notes that "Mr. Brasch's petition does *not* show that he ever even entertained a thought of a federal question prior to the entry of that judgment adverse to him". This presumption is not substantiated by the facts of his case. Petitioner's attorney had told him that his cause is an example of "inverse condemnation" by a state in violation of the Fourteenth Amendment of the Constitution of the United States, that the statute of limitations of the United States applies to his cause and that his cause is not barred by the statute of limitations; but his attorney filed no amendment to his complaint; he just kept on promising to file it.

VI

CONCERNING THE ARGUMENT OF THE RESPONDENT STATE COMPENSATION INSURANCE FUND THAT "THE PETITION FAILS TO DEMONSTRATE THAT THE DECISIONS BELOW DID NOT REST UPON A STATE GROUND WHICH INDEPENDENTLY AND ADEQUATELY SUPPORTS THE JUDGMENT".

The denial of the appeal of petitioner by the Appellate Division of the Superior Court is not in accord with the decisions of this Court quoted on page 31 of his petition.

In support of its argument that the appeal of petitioner was properly denied by the Appellate Division of the Superior Court, the respondent quotes California Code of Civil Procedure, section 475, for the first time. This section provides that "no error or defect to be regarded unless it affects substantial rights". Petitioner had claimed in the courts below that the respondents denied him the equal protection of the laws and deprived him of property for public use without compensation and due process of law in violation of the cited provisions of the Fourteenth Amendment to the Constitution of the United States. This Court said in *Yick Wo v. Hopkins, Sheriff,* 118 U.S. 356 (1885): "The guarantees of protection contained in the Fourteenth Amendment of the Constitution extend to all persons within the territorial jurisdiction of the United States, without regard to differences of race, of color, or of nationality."

And in *United States v. Lynah,* 188 U.S. 445, 465 this Court held:

> "The government may take personal or real property whenever its necessities or the exigiencies of the occasion demand . . . but the Constitution in the Fifth Amendment guarantees that when this right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation."

Since petitioner had claimed that the respondents denied him substantial rights, CCP 475 does not apply to his case.

Petitioner did not have to move the court of first instance to set aside the Judgment of Dismissal with Prejudice because he appealed from this Judgment with the Appellate Division of the Superior Court on basis of California Code of Civil Procedure §988h, which provides that

> "the superior court may review, . . . affirm, reverse or modify any judgment or order appealed from . . .". (Appendix, page vi.)

Title 31, U.S.C. §235: Limitation of suit states:

> "Every such suit shall be commenced within six years from the commission of the act, and not afterward, (R.S. §3494.) Derivation Act Mar. 2, 1863, ch. 67, §7, 12 Stat. 698."

Title 28, U.S.C. §2401. Time for commencing action against United States, provides:

> "(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. . . ."

Petitioner cited *Kendall v. United States,* 107 U.S. 123, 125 because this Court affirmed in this case that the statute of limitations of the United States is six years.

Petitioner explained already on page 9 of his petition that Government Code section 19630 does not apply to his cause. He cited *Philbrick v. State Personnel Board* (1942) 53 CA 2d 222, 127 P 2d 634 on page 12, lines 11-16 of his opening brief in the Superior Court. The citation of *Philbrick v. State Personnel Board* is stated in Deering's California Codes Annotated, Government Code, §§15260 to 22990, page 436, following Government Code §19630. (Appendix, page vii.)

Petitioner explained already on page 14, lines 1-14 of his opening brief in the Superior Court that *McFarland v. Holcomb* (1898), 123 Cal. 84, and his case are not comparable.

In support of its argument that "this Court has said where the highest court of a state delivers no opinion in rendering a judgment and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment", the respondent cites the following two cases.

In the first case, *Stembridge v. Georgia* (1952), 343 U.S. 541, 547, Stembridge was convicted of involuntary manslaughter. The Georgia Court of Appeals affirmed the conviction, and the Supreme Court of Georgia denied certiorari. His motion in the trial

court for a new trial on the ground of newly discovered evidence was denied. The Court of Appeals affirmed the denial of this motion on adequate state grounds. Petitioner then in a motion for rehearing for the first time claimed violation of his federal constitutional rights. The Court of Appeals denied the motion without opinion, and the Supreme Court of Georgia denied certiorari without opinion. In an amendment thereafter the Circuit Court of Appeals stated that it had considered the federal question and decided it adversely to petitioner. "Without seeking a review of this amending order in the Supreme Court of Georgia, petitioner applied to this Court for certiorari, which was granted." This Court dismissed the case since the Supreme Court of Georgia had not been asked to pass on the amending order. This Court further held that the Supreme Court of Georgia in denying certiorari for rehearing *might* have rested its decision on adequate State grounds because "the attempt to raise the question of constitutional rights in the general terms of the above quotation from the petition for certiorari did not begin to meet the requirement of the Supreme Court of Georgia for definiteness. . . . At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds."

The respondent avers that the decision of this Court in *Stembridge v. Georgia* applies to the case of peti tioner; evidently this contention is completely unsound since petitioner claimed at the first opportunity in the court of first instance and in the appel-

late court (when his former attorneys had returned his litigation papers to him) that the respondents denied him the equal protection of the laws and deprived him of property for public use without compensation and without due process of law in violation of the cited provisions of the Fourteenth Amendment to the Constitution of the United States and since the courts below denied his appeal, petition for rehearing, petition for a writ of certiorari and petition for a hearing without opinion. Furthermore, this case and the case of petitioner are not comparable, as explained immediately above.

In the second cited case, *Fay v. Noia* (1963) 372 U.S. 391, 428, Noia and his codefendants were convicted in a New York State Court of murder committed during a robbery, and each was sentenced to life imprisonment; the sole evidence against each was his confession. Respondent did not appeal. The codefendants did not accomplish their appeals, but they were successful in subsequent proceedings and released on the ground that their confessions were coerced and their convictions violated the Fourteenth Amendment. Thereafter, the State Court denied Noia coram nobis review of his conviction since he had not appealed. A Federal District Court denied Noia a writ of habeas corpus holding that his failure to appeal was a failure to exhaust available state remedies. The Court of Appeals reversed. This Court affirmed the judgment of the Court of Appeals on other grounds. Obviously, for the grounds given in the preceding case, this case and the case of petitioner are not comparable.

Furthermore, the respondent asserted that this Court held in *Fay v. Noia* "That where the highest court of a state delivers no opinion in rendering a judgment, and it appears that the judgment *might* have rested upon a nonfederal ground, the Court will not take jurisdiction to review the judgment". However, this Court stated positively on page 428 as follows: "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds."

Since the courts below denied the claims of petitioner without opinion that the respondents denied him the claimed, specific rights under the Fourteenth Amendment to the Constitution of the United States, as set forth in the preceding case, their decrees are not in accord with the holding of this Court in *Fay v. Noia.*

VII

CONCERNING THE ARGUMENT OF THE RESPONDENT STATE COMPENSATION INSURANCE FUND THAT "THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION".

On this point the respondent cites two decisions of this Court in support of its assertion that the petition of petitioner "fails to contain any special and important reasons for the granting thereof".

In the first case, *Hammerstein v. Superior Court of California, et al.* (1951) 341 U.S. 491, 492, petitioner

did not appeal from a default judgment of the Superior Court but applied to the District Court of Appeal for a writ of prohibition, which did consider the federal question in denying the writ. The Supreme Court of California denied a writ of certiorari on adequate state grounds, namely, the failure of petitioner to appeal from the default judgment. Petitioner applied for a writ of certiorari with this Court. This Court held that since petitioner had not appealed from the default judgment, there was no final judgment rendered "by the highest court of a State in which a decision could be had", 28 U. S. C. §1257, this Court had no jurisdiction "to review the proceedings arising from the default judgment".

Obviously, this case and the case of petitioner are not comparable since petitioner claimed denial of his Constitutional rights, as explained before, at the earliest opportunity in the courts below and the Supreme Court of California in its decree decided against these claimed rights without opinion.

The second case, *Rice v. Sioux City Memorial Park Cemetery, Inc. et al.*, 349 U.S. 70, 73 deals with an action by petitioner for damages for mental suffering flowing from the refusal of a cemetery to bury her husband, a Winnebago Indian, after services had been conducted at the graveside. The contract of sale of the burial lot also provided that "burial privileges accrue only to members of the Caucasian race". The trial court held that the clause was not void but was unenforceable as a violation of the Constitutions and public policy of Iowa and of the United States. The Supreme

Court of Iowa affirmed. This Court granted a writ of certiorari and affirmed the judgment of the Supreme Court of Iowa. Upon consideration of a petition for rehearing before a full Court, it appeared that Iowa had passed remedial legislation since the commencement of this litigation so that the ultimate question would not again arise in Iowa. The Court vacated the judgment of affirmance and dismissed the writ of certiorari since in this case the special and important reasons for granting the writ of certiorari required by Supreme Court Rule 19 no longer were present.

This case and the case of petitioner are not comparable because in his case the Supreme Court of California denied summarily and without opinion his claims that the State of California denied him the equal protection of the laws and deprived him of property for public use without compensation and due process of law in violation of the cited provisions of the Fourteenth Amendment to the Constitution of the United States and in disregard of the applicable decisions of this Court as he submitted in his reasons for granting the Writ. (Petition for a Writ of Certiorari pages 25-31).

Petitioner respectfully submits that the special and important reasons required by Rule 19 of the Rules of the Supreme Court, 28 U.S.C., for granting review on writ of certiorari are present in his case. Petitioner claimed that the Supreme Court of California without opinion denied his claims that the respondents denied him the equal protection of the laws and deprived him of property for public use without com-

pensation and due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States. Concerning claims involving the denial of Constitutional rights this Court said: "It is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made." The state courts "must act in subordination to the duty of this Court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare *Chambers v. Florida,* 309 U.S. 227." *Milk Wagon Drivers' Union of Chicago v. Meadowmoor Dairies, Inc.* 312 U.S. 287, 293, 298-299.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
October 26, 1965.

GERHARD BRASCH,
Petitioner in propria persona.

(Appendix Follows)

Appendix

3035 Gough Street, Apt. 8
San Francisco, California 94123
October 26, 1964

The Honorable Leland J. Lazarus
Presiding Judge of the Municipal Court
City Hall
San Francisco, California

Re: Brasch vs. State Compensation Insurance Fund
State Personnel Board
Complaint No. 519083,
Municipal Court

Your Honor:

Mr. Brian D. Rohan no longer has power of attorney to represent me in the above matter. I had paid Mr. Rohan $50 on August 17, 1964 for filing an amendment to my complaint. Mr. Rohan promised me many times to file this amendment; however, he did not do it. Therefore I filed a complaint against Mr. Rohan today for the return of my payment and of my litigation papers. As soon as I shall have received my papers, I will submit an amendment to my complaint, acting again in propria persona. For the information of Your Honor I am enclosing a copy of this complaint.

May I take the liberty of mentioning that my suit against Mr. Rohan proves that I, who never formally studied law through class instruction or by correspondence, could not find an attorney willing to represent me in the above matter even though I had

paid the fee of more than one attorney in the belief that he would file a complaint.

Respectfully submitted,
Gerhard Brasch.

Enclosure.

Letterhead of
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
STATE BUILDING, SAN FRANCISCO 94102

August 18, 1964

Hallinan, Shapiro & Hallinan
Attorneys at Law
345 Franklin Street
San Francisco, California

Attention Mr. Brian D. Rohan

Re: Gerhard Brasch v. State Comp. Ins. Fund and State Personnel Board
San Francisco Municipal Ct. No. 519083

Dear Sirs:

This office represents the State Personnel Board in the above referred to action. We have been informed that you have been retained to represent the plaintiff and that the demurrer of the State Compensation Insurance Fund which was heard on August 14 was sustained with leave to amend.

Our time to answer on behalf of the State Personnel Board expires on August 28. It would save time and trouble for all parties if we could enter into an agree-

ment whereby the State Personnel Board would not have to appear until ten days after it is served with the Amended Complaint even though that may occur after August 28. If you are in agreement with this, will you please send us a letter to that effect.

Your courtesy in this matter is appreciated.

Very truly yours,
STANLEY MOSK,
Attorney General
By Robert L. Bergman,
Deputy Attorney General

RLB:MSM

Letterhead of
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
STATE BUILDING, SAN FRANCISCO 94102

September 29, 1964

Messrs. Hallinan, Shapiro & Hallinan
Attorneys at Law
345 Franklin Street
San Francisco, California

Attention Mr. Brian D. Rohan

Re: Gerhard Brasch v. State Compensation Insurance Fund and State Personnel Board
San Francisco Municipal Court No. 519083

Dear Mr. Rohan:

Enclosed is a stipulation extending time to plead, pursuant to our recent telephone conversation. If this meets with your approval, I would appreciate your dating, signing, and returning to me the original and two copies, including the one marked "ATTORNEY GENERAL—OFFICE COPY." The other copy is for your file.

Thank you very much for your courtesy.

Yours very truly,
THOMAS C. LYNCH
Attorney General
LEONARD M. SPERRY, Jr.
By Leonard M. Sperry, Jr.
Deputy Attorney General

LMS:FC
5 encls.

Thomas C. Lynch
Attorney General of California
Leonard M. Sperry, Jr.
Deputy Attorney General
6000 State Building
San Francisco 2, California
UNderhill 1-8700
Attorneys for Defendant,
State Personnel Board

In the Municipal Court of the City and County
of San Francisco
State of California

No. 519083

Gerhard Brasch,
Plaintiff
vs.
State Compensation Insurance Fund
and State Personnel Board,
Defendants

STIPULATION EXTENDING TIME TO PLEAD

It Is Hereby Stipulated by and between counsel for plaintiff and defendant State Personnel Board that said defendant may have up to and including the thirtieth day following the filing by plaintiff of his amended complaint in the above matter in which to

demur, answer, or otherwise plead. This stipulation may, but need not, be filed.

Dated: ....., 1964.

Hallinan, Shapiro & Hallinan
by Brian Rohan
Attorneys for Plaintiff
Thomas C. Lynch
Attorney General of California
Leonard M. Sperry, Jr.
Deputy Attorney General
Leonard M. Sperry, Jr.
Attorneys for Defendant
State Personnel Board

Deering's California Codes Annotated, Civil Procedure, §§ 802 to 1059 (1959), pages 541-542:

§ 988h. [*Scope of review and powers of superior court: New trials: Damages added to costs where appeal was taken for delay.*] Upon an appeal from a municipal court, the superior court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the right of a party, including, on any appeal from the judgment, any order on motion for a new trial, and may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, and may, if necessary or proper, direct

a new trial or further proceedings to be had. The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken. If there be a new trial, it must be in the municipal court. If it appears to the superior court that any appeal was taken solely for delay, it may, on dismissal of such appeal or affirmance of the judgment or order appealed from, add to the costs of appeal such damages as may be just, not exceeding 25 percent of the judgment appealed from, if it be a judgment for money, or 25 percent of the value of the property if it be a judgment for the recovery of specific personal property.

Deering's California Codes Annotated, Government Code, §§ 15260 to 22990, at page 436:

This section was intended to apply only to the claims of individuals, particularly salary claims of employees or those who had been separated from the service. Philbrick v. State Personnel Board (1942) 53 CA2d 222, 127 P2d 634.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,
vs.
STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

GERHARD BRASCH,
3035 Gough Street, Apt. 8,
San Francisco, California 94123,
Petitioner in propria persona.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,
vs.
STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of this Court's order dated December 6, 1965, denying the petition for a writ of certiorari to the Supreme Court of the State of California, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

I.

The respondent State Compensation Insurance Fund asked this Court to deny the petition of petitioner for a writ of certiorari because "no Federal question was properly raised or preserved in the State Courts".

This Court held in *Yick Wo v. Hopkins, Sheriff,* 118 U. S. 356, 373 that the equal protection of the laws extends to all persons "by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States". Petitioner explained in his petition and in his reply brief that he could not find an attorney willing to protect his Constitutional rights in a court of law. He respectfully submits that the effect of the denial of his petition is a classification of petitioners who ask this Court to review the denial of their claimed rights under the Fourteenth Amendment by the highest court of a state into two groups; one, entitled to a writ of certiorari, because its attorneys had claimed the denial of these rights timely and properly in the trial court, and another one, not entitled to a writ of certiorari, the group of petitioner, a layman, who could not find an attorney willing to file a complaint in his cause, whose complaint was his first endeavor in drafting a complaint, and whose attorneys who then accepted his case did nothing to protect his rights and returned his litigation papers to him only after the Municipal Court had entered a Judgment of Dismissal with Prejudice without opinion upon ex parte motion of the respondent

State Compensation Insurance Fund against him and a Judgment of Default by Court against them for the return of his litigation papers. Since, however, this Court held that the guarantees of protection contained in the Fourteenth Amendment extend to all persons, petitioner respectfully submits that the denial of his petition cannot be reconciled with the cited holding of this Court and that it will result in an unjustifiable discrimination between persons petitioning this Court for a writ of certiorari of the denial of like Constitutional rights unless this conflict is resolved.

II.

In moving for a Judgment of Dismissal with Prejudice against petitioner the respondent State Compensation Insurance Fund stated in its memorandum of points and authorities that in *Oppenheimer v. Deutchman,* 1955, 132 C. A. 2d Supp. 875, 281 P. 2d 650 "the action was dismissed with prejudice on ex parte motion of Defendant", whereas the Superior Court in this case had stated several times that the court below, while properly dismissing the action, should not have done it *with prejudice* and that the words "with prejudice" must be stricken from the judgment. The judge in the Municipal Court signed the draft of the Judgment of Dismissal *with Prejudice* prepared by the respondent but gave no grounds for entering this judgment even though it was not in accord with the decision in the *Oppenheimer* case. In his notice of appeal and in his briefs in the Appellate

Division of the Superior Court petitioner pleaded the denial of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States by the respondents. But the Superior Court, the District Court of Appeal and the Supreme Court of the State affirmed the Judgment of Dismissal with Prejudice without stating why petitioner should be forever barred from having a new trial and submitting his claim of the denial of his state and federal rights to a jury.

Petitioner respectfully submits that this Court should grant his petition for rehearing because the denial of his petition is in conflict with the decisions of this Court stated on page 31 of his petition for a writ of certiorari since its effect is an affirmation of the Judgment of Dismissal *with Prejudice,* a bar to petitioner from ever asserting his claim of the violations of his rights under the Fourteenth Amendment by the respondents, and a reward to the respondent State Compensation Insurance Fund for having successfully forever taken away the right of petitioner of asserting his claim of the denial of his Constitutional rights in a trial court by means of its false citation.

III.

In further support of his petition for rehearing petitioner respectfully submits that his case requires the settlement of substantial federal questions in the public interest, namely, that the respondents denied him the equal protection of the laws and deprived him of property for public use without compensation and

hearing in violation of the provisions of the Fourteenth Amendment, which serious charges the respondents never disputed. Concerning substantial federal questions this Court declared that it is of prime importance that no Constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality and that the State courts must act in subordination to the duty of this Court to enforce Constitutional liberties even when denied through spurious findings of fact in a state court; *Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 293, 298-299.

IV.

Petitioner petitioned in vain the State Personnel Board, the Governor, the Attorney General, and members of the State Legislature for redress of his grievances, explained in his complaint; no hearing was held. He filed a complaint in the Municipal Court in propria persona. The respondent State Compensation Insurance Fund demurred. Attorneys who then accepted his case promised him to plead the denial of his rights under the Fourteenth Amendment by the respondents in an amendment to his complaint. They asked the court for two extensions of time, but they filed no amendment, granted the Attorney General, counsel for the respondent State Compensation Insurance Fund, in an unfiled stipulation thirty days time to plead to the amended complaint of petitioner without informing him of this action while he was their client, and returned his litigation papers to

him only after the Municipal Court had ordered them to return them. Petitioner submits that the action of his former attorneys in his case cannot be reconciled with the historic concept that a lawyer is an officer of the court and that he is bound to work for the advancement of justice, while faithfully protecting the rightful interests of his clients; *Hickman v. Taylor*, 329 U. S. 495, 510.

In his appeal and in his briefs in the Appellate Division of the Superior Court petitioner, again in propria persona, pleaded the denial of his rights under the Fourteenth Amendment. His appeal was denied without opinion.

Petitioner respectfully submits that he raised the federal claim at the first opportunity available to him and that the Judgment of Dismissal with Prejudice without opinion, the denial of his petition for a hearing without opinion by the Supreme Court of the State of California, and the refusal of the executive, administrative and legislative agencies of the State to provide redress of his grievances violates his right to due process of law, in its primary sense of an opportunity to be heard and to defend his substantive rights in a trial court.

> "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded

to him some real opportunity to protect it." *Brinkerhoff-Faris v. Hill,* 281 U. S. 673.

V.

Petitioner urges this Court to grant his petition for rehearing because otherwise the benign provisions of the Fourteenth Amendment, which are guaranteed to all persons will become unenforceable, moot and of academic interest only in his case for the reasons set forth, and he submits furthermore that Rule 23(f) of the Rules of this Court must yield to the intent of the Fourteenth Amendment to the Constitution of the United States and the interests of justice. "The interest in finality of litigation must yield when the interests of justice would make unfair the strict application of the Rules of this Court." *United States v. Ohio Power Co.,* 353 U. S. 98.

CONCLUSION

For the reasons set forth above it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the Supreme Court of the State of California.

Dated, San Francisco, California,
December 20, 1965.

Respectfully submitted,
GERHARD BRASCH,
Petitioner in propria persona.

Certificate of Petitioner

I, Gerhard Brasch, petitioner in propria persona, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

Dated, San Francisco, California,
December 20, 1965.

Gerhard Brasch,
Petitioner in propria persona.